Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

DETROIT INTERNATIONAL BRIDGE COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The questions presented are:

1. Whether the district court lacked subject matter jurisdiction where the district court had jurisdiction over the underlying consolidated condemnation cases and, as the potential remunerator for the property at issue, DIBC's claims were "so related to claims in the action within such original jurisdiction that they form part of the same case or controversy"?

2. Whether DIBC's motion to intervene was untimely where DIBC, a party in a consolidated case, filed its motion to intervene to object to a $14.9 million settlement agreement within approximately five weeks of discovering the terms of the settlement agreement and where the Government renewed its claim that DIBC was obligated to indemnify the Government for the settlement amount.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

CenTra, Inc. is the parent corporation of Petitioner Detroit International Bridge Company. No publicly held companies own 10 percent or more of the stock of Petitioner. Petitioner is the Proposed Intervenor in the proceedings below.

United States of America is the Respondent and the Plaintiff in the proceedings below.

Commodities Export Company and Walter H. Lubienski are Respondents and the Defendants in the proceedings below.

Certain Land Situated in the City of Detroit, Wayne County, Michigan; 0.74 Acre of Land, More or Less, Situated in the City of Detroit, Wayne County, Michigan, et al. are the Defendants in the proceedings below.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS AND ORDERS BELOW

The panel opinion of the United States Court of Appeals for Sixth Circuit is reported at *United States v. Certain Land Situated in the City of Detroit*, 361 F.3d 305 (6th Cir. 2004) and is reprinted at App. 3a-15a. ("Opinion"). The order denying petition for rehearing *en banc*, filed August 19, 2004, is reprinted at App. 2a. The opinion and order of the United States District Court for the Eastern District of Michigan, case nos. 96-75494, 96-75495, and 01-70391, denying defendant Detroit International Bridge Company's motion to intervene is reprinted at App. 16a-41a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered its judgment on March 9, 2004, and denied petitioner's timely petition for rehearing *en banc* on August 19, 2004. App. 2a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Because the United States is a party in this lawsuit, the Solicitor General of the United States has been served with this petition for writ of certiorari via United States Mail, at Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1367(a).

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

Fed. R. Civ. P. 24(a).

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

STATEMENT OF THE CASE

I. Overview of the Case

The majority of the Sixth Circuit panel did not review the reasons for the district court's denial of the Detroit

International Bridge Company's ("DIBC") motion to intervene. Rather, the majority opinion affirmed on the ground that the district court lacked subject matter jurisdiction over DIBC's intervention claim. The panel's majority opinion contravenes United States Supreme Court precedent and long-standing supplemental jurisdiction principles.

The concurring opinion of the Sixth Circuit panel held that DIBC's motion to intervene was not timely filed because DIBC should have intervened in 1996 when the Government filed eminent domain proceedings against only a portion, rather than the entire, Commodities Property as it had agreed to in the MOA because, at that time that DIBC "'knew or reasonably should have known' of its purported interest in the Commodities/Lubienski condemnation cases." App. 34a. However, the district court and Judge Cole each failed to consider that (i) DIBC first became aware of the terms of the $14.9 million Commodities settlement on November 15, 2001, and that the Government renewed its claim that DIBC was obligated to indemnify the Government for that amount; (ii) DIBC filed objections to the Commodities settlement within six days and its motion to intervene within five weeks of discovering the terms of the Commodities settlement and that the Government had once again sought remuneration from DIBC; and (iii) the Commodities cases were consolidated with the DIBC 1979 case.

II. Background of the Case

Nature of the Case. This appeal was taken in three of four consolidated condemnation cases. Proposed Intervenor-Petitioner, DIBC, is the defendant in *United States v. Certain Land*, No. 79-73934 (the "1979 Case"). An appeal from a judgment awarding $15,683,327.05 additional just compensation to DIBC remains pending in the Sixth Circuit

Court of Appeals, No. 04-1052. DIBC appealed the district court's decision denying its motion to intervene in the other three cases, *United States v. 0.41 Acres of Land*, No. 96-75494 and *United States v. 0.074 Acres of Land*, No. 96-75495 (the "1996 Cases"); and in *United States v. 0.41 Acres of Land*, No. 01-70391 (the "2001 Case"), which were condemnation proceedings involving Plaintiff-Respondent, the United States of America ("United States" or "Government"), and Defendants-Respondents Walter H. Lubienski ("Lubienski") and Commodities Export Co. ("Commodities"). The 1996 Cases and the 2001 Case are collectively referred to as the "Commodities Cases" and Commodities and Lubienski are collectively referred to as the "Commodities Defendants." The property that was the subject of the Commodities Cases is referred to as the "Commodities Property."

The 1979 Case. The 1979 Case against DIBC arises from the United States' 1979 condemnation of 3.75 acres of land formerly owned by DIBC. App. 17a. The land at issue in the 1979 Case is located at the Detroit approach to the Ambassador Bridge in Detroit, Michigan, which connects Detroit to Windsor, Ontario, Canada. The United States sought DIBC's land for the purpose of expanding a Customs cargo facility, located adjacent to the Ambassador Bridge, in order to expedite secondary Customs inspection and relieve chronic traffic congestion on the Bridge.

The Memorandum of Agreement. On May 21, 1991, the United States, through the General Services Administration ("GSA"), and DIBC entered into what was intended to be a settlement agreement in the 1979 Case entitled "GSA-DIBC Memorandum of Agreement" (the "MOA"). At that time, the MOA contemplated that GSA agreed, *inter alia*, to expand the scope of the federal project to include condemning the

Commodities Property; and that DIBC would agree to pay the Government's "Incremental Costs," which included the cost of acquiring Commodities and Lubienski's property. The MOA is discussed in *United States v Detroit Int'l Bridge Co.*, 7 F.3d 497 (6th Cir. 1993) (the "1993 Opinion").

Commodities' Intervention in the 1979 Case. At the time, Commodities operated a duty-free store on the Detroit side of the Ambassador Bridge. Lubienski owned a parcel of land (near the Ambassador Bridge) near the store. On December 30, 1991, Commodities and Lubienski filed motions in the district court to intervene in the 1979 Case and for a preliminary injunction against the implementation of the MOA. Commodities and Lubienski contended that the MOA contemplated the condemnation of their land.

On April 6, 1992, the district court denied both motions to intervene in the 1979 Case. 7 F.3d 497, 499 (6th Cir. 1993). The Sixth Circuit reversed the district court and directed it to permit Commodities and Lubienski to intervene in the 1979 Case. 7 F.3d at 503. Subsequently, DIBC, Commodities and Lubienski litigated the issue of the MOA's validity and the Commodities Defendants' claim for injunctive relief to enjoin implementation of the MOA. On December 30, 1994, the district court denied the Commodities Defendants' motion for preliminary injunction against the MOA. *United States v. Certain Land Situated in the City of Detroit*, 873 F. Supp. 1050 (E. D. Mich. 1994), *aff'd*, 76 F.3d 380 (6th Cir.), (Table) (unpublished), *cert. denied,* 519 U.S. 819 (1996).

The 1996 Cases. The Government initiated the condemnation actions against Commodities and Lubienski in 1996. *United States v. 0.41 Acres of Land,* Civil No. 96-75494 and *United States v. 0.074 Acres of Land*, Civil No.

96-75495, respectively. However, the Government initially *reversed* its decision to take to take all of the Commodities Property. In the 1996 Cases as filed, the Government sought to condemn only a portion or "slice" of the Commodities Property. App. 5a.

The 2001 Case. In 2001, the Government again changed its decision to take only a small slice of the Commodities Property. On January 29, 2001, it filed a new Condemnation Complaint and Declaration of Taking, which took the Commodities Property in its entirety. *United States v. 0.41 Acres of Land*, Civil No. 01-70391. App. 5a. Thus, the Government initially agreed to take all of the Commodities property in the MOA; it then *reversed* itself and sought only a "slice" of the property in the 1996 Cases; it then *reversed* itself again in condemning all of the Commodities property in the 2001 Case.

The Consolidation. On August 1, 2001, the district court entered an order *sua sponte* consolidating the 1979 Case with the 1996 Cases and 2001 Case.

The Government/Commodities Settlement. From August to November 2001, the Government and the Commodities Defendants engaged in court-supervised and other settlement negotiations without DIBC's participation. App. 25a. During a November 15, 2001, settlement conference in the consolidated cases, DIBC learned for the first time that the Government and Commodities had reached an agreement to settle the 1996 Cases and the 2001 Case, wherein the Government agreed to pay Commodities and Lubienski $14.9 million as just compensation for their two parcels of property. App. 27a. The district court found that on that date the position of the Government and DIBCO was that the MOA was null and void. During the settlement conference and in

the presence of the Court, the Government's counsel first stated that, in light of the settlement, the Government considered the MOA with DIBC to be void and that the Government did not intend to seek payment from DIBC under the MOA to reimburse the Government for the $14.9 million paid to acquire the Commodities property. Subsequently, the Government again changed its position, and stated that it might seek reimbursement of $14.9 million from DIBC pursuant to the MOA.

DIBC's Objections and Motion To Intervene. Within six days of this discovery, on November 21, 2001, DIBC filed objections to the proposed settlement agreement. On December 6, 2001, the Government filed a response to DIBC's objections to the settlement, denying DIBC's "standing" to object and asking that DIBC's objections be denied. The Government admitted that Paragraphs 5 and 6 of DIBC's objections were generally true. The Government denied Paragraph 7 of DIBC's objections. The Government "took no position as to the MOA" and denied that it was relevant to the settlement. Although the cases had been earlier consolidated, and the Commodities Defendants had intervened in the 1979 Case, DIBC was not formally a party in the 1996 Cases or the 2001 Case. Accordingly, on December 28, 2001, DIBC filed a motion to intervene in the 1996 Cases and the 2001 Case.

Disposition Below. Two months after DIBC's motion to intervene was filed, on February 27, 2002, the district court simultaneously (i) approved the $14.9 million settlement agreement in the 1996 and 2001 Cases between the Government and the Commodities Defendants, for which the Government asserted that DIBC was obligated to indemnify, and (ii) denied DIBC's motion to intervene. It is this denial that is the subject of DIBC's current appeal. The district

court ruled that DIBC had failed to establish that DIBC's motion to intervene, filed two months earlier, was timely App. 34a-35a; that DIBC had failed to establish that DIBC has a substantial interest in the Commodities Cases; App. 36a-39a; and that DIBC had failed to establish that DIBC's ability to protect its interest was impaired in the absence of intervention. App. 40a.

REASONS FOR GRANTING THE WRIT

I. Review Is Warranted Because The Panel Erred In Holding That The District Court Lacked Subject Matter Jurisdiction Over DIBC's Intervention Claim.

The Panel's majority opinion did not review the reasons for the district court's denial of DIBC's motion to intervene. Rather, the majority opinion affirmed on the ground that the district court lacked subject matter jurisdiction over DIBC's intervention claim. App. 6a. The Panel's majority opinion contravenes this Court's precedent and long-standing supplemental jurisdiction principles. Judge Cole's concurring opinion noted:

> In grounding its decision concerning a motion to intervene as of right in questions of independent jurisdiction, the majority turns a blind eye to the *longstanding principle that intervention as of right pursuant to Rule 24(a)(2) requires no independent ground of jurisdiction to support the applicant's claim.* 32A AM. JUR. 2d Federal Courts §700 (2003); James Wm. Moore et al., 6 MOORE'S FEDERAL PRACTICE §24.22 (3rd ed. 1998); Charles Alan Wright et al., FEDERAL PRACTICE AND PROCEDURE §1917 (2nd ed. 1986); *see also*

International Paper Co. v. Inhabitants of Town Jay, Me., 887 F.2d 338, 346 (1st Cir. 1989) (parties entitled to intervention as of right fall within a federal court's ancillary jurisdiction; no independent basis of jurisdiction is necessary); *Curtis v. Sears, Roebuck & Co.*, 754 F.2d 781 (8th Cir. 1985) (same). Only where intervention is permissive, pursuant to Rule 24(b), must independent jurisdictional grounds be shown. MOORE'S FEDERAL PRACTICE §24.22 (3rd ed. 1998). But intervenors as of right - the category in which DIBCO claims to belong - need not show independent jurisdictional grounds because the court has supplemental jurisdiction over their claims. *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 376 n. 18 (1978). It is unclear why the majority forgoes an analysis under Rule 24(a)(2). Moreover, our circuit has never dismissed a case pursuant to Rule 24(a)(2) for lack of an independent basis for jurisdiction - indeed, it seems that no federal court of appeals has ever done so.

Jurisdiction to hear claims by intervenors of right depends only upon the court's jurisdiction to hear the primary, underlying action and the terms of supplemental jurisdiction set forth in 28 U.S.C. §1367. *DIBCO easily satisfies that standard here: as the potential remunerator for the property at issue, its claims are "so related to claims in the action within such original jurisdiction that they form part of the same case or controversy."* 28 U.S.C. §1367. There is no dispute that the district court had jurisdiction to hear the action between the United States and the Commodities defendants. Accordingly, the "inquiry into the substantiality of the claimed interest" by DIBCO "is necessarily fact specific" and tied only to

> the factors enumerated in Rule 24(a)(2), that is, the extent of DIBCO's interest in the subject of the action and the extent to which not intervening may impair or impede DIBCO's ability to protect that interest. *Id.*

App. 10a-11a; (emphases added).

DIBC sought to intervene as of right. The district court had original jurisdiction over the underlying condemnation action. 28 U.S.C. § 1358. In such a case:

> [T]he district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. *Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.*

28 U.S.C. § 1367(a) (emphasis added).

As Judge Cole's concurring opinion states, "DIBCO easily satisfies that standard here: as the potential remunerator for the property at issue, its claims are 'so related to claims in the action within such original jurisdiction that they form part of the same case or controversy". App. 11a. DIBC's interest in this case logically arose when the Government threatened to seek indemnification for the $14.9 million Commodities settlement from DIBC. The Government had sought the Court's approval of the settlement amount, to which DIBC objected. Thus, that issue was already present in the Commodities cases. The reasonableness of the $14.9 million Commodities settlement, which was an issue within the scope of the Commodities cases, presented an issue closely related

to the amount of potential liability the Government threatened to impose on DIBC, and formed "part of the same case or controversy..." under 28 U.S.C. § 1367(a). Thus, DIBC was not required to show an independent basis of subject matter jurisdiction. *Owen Equipment, supra* (citing *Phelps v. Oaks*, 117 U.S. 236, 241 (1886)). Therefore, the Panel's majority opinion erred holding that the district court lacked subject matter jurisdiction to consider DIBC's motion to intervene.

II. The District Court Abused Its Discretion In Finding DIBC's Motion To Intervene Untimely.

Fed. R. Civ. P. 24 ("Rule 24") provides for intervention of right as follows:

> **(a) Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

In the Sixth Circuit, Rule 24 is "broadly construed in favor of potential intervenors." *Purnell v. Akron*, 925 F.2d 941, 950 (6th Cir. 1991); 7 F.3d at 505-506 (stating that the Sixth Circuit has adopted a "permissive approach" to intervention).

The district court and Judge Cole's concurring opinion held that DIBC's motion to intervene was not timely filed because DIBC should have intervened in 1996 when the

Government filed eminent domain proceedings against only a portion ("slice"), rather than the entire Commodities Property as it had agreed to in the MOA because, at that time that DIBC "'knew or reasonably should have known' of its purported interest in the Commodities/Lubienski condemnation cases." App. 34a. However, the district court and Judge Cole each failed to consider the following relevant factors: (i) DIBC first became aware of the terms of the $14.9 million Commodities settlement on November 15, 2001 and that the Government renewed its claim that DIBC was obligated to indemnify the Government for that amount; (ii) DIBC filed objections to the Commodities settlement within six days and its motion to intervene within five weeks of discovering the terms of the Commodities settlement and that the Government had once again sought remuneration from DIBC; and (iii) the Commodities cases were consolidated with the DIBC 1979 case.

The district court and Judge Cole's finding that DIBC's intervention was untimely contravenes Sixth Circuit precedent because each failed to consider *all* of the *relevant* circumstances of the case, in particular the time that DIBC discovered the terms of the Commodities settlement and the Government's renewed claim for remuneration from DIBC. 7 F.3d 497; *Beckert v. TPLC*, 221 F.3d 870 (6th Cir. 2000). The Sixth Circuit previously held in 1993 that the district court abused its discretion in finding Commodities' motion to intervene untimely under similar facts involving the same lawsuits, parties and MOA. 7 F.3d at 502-503. In the earlier appeal, the Sixth Circuit found that the district court abused its discretion in finding Commodities motion to intervene "not timely" as follows:

> *We believe the district court failed to consider all of the circumstances of this case in ruling on the*

timeliness of Commodities' and Lubienski's motion to intervene.

The MOA is dated March 28, 1991. Commodities and Lubienski filed their motion to intervene on December 30, 1991. In their motion to intervene, they concede that they were aware of "talk and speculation in the media about an agreement between DIBCO and GSA," but that they were *unaware of the "actual terms of the agreement"* or the fact that the agreement "was to settle this particular lawsuit" until December 9, 1991. (R203: Motion to Intervene, p. 3). *Commodities and Lubienski also stated in their motion that during their negotiations with GSA they "were told by Michael Gelber, the GSA project manager for the third condemnation, that no plan was final yet and that GSA would consider alternate plans proposed by Commodities."* *Id.* Lubienski also filed a motion to compel discovery of certain documents regarding the condemnation proceedings involving his land. *Id.* at 4. The United States objected to this request on May 1, 1991, on the grounds that the documents sought were not relevant to the condemnation proceeding. *Id.* Lubienski argues that had the United States complied with his discovery requests, he "would have discovered the existence of [the MOA] and would have been able to move for intervention earlier." *Id.*

In ruling on the timeliness of Commodities and Lubienski's motion to intervene, the district court focused on Lubienski's contention that he would have filed for intervention earlier had the United States disclosed the MOA pursuant to his discovery request. The district court dismissed this argument by stating

> that there is "no indication when [Lubienski's] motion was filed." (R211: Opinion and Order of Trial Court, p. 10). The court minimally addressed the timeliness issue in its written opinion, merely stating that it was "not satisfied that the proposed intervenors have established that they had no way of learning of the proposed agreement before December 1991 so as to render the instant December 30, 1991 motion to intervene timely." *Id.* We think the court's analysis and consideration of the circumstances surrounding this case [were] inadequate and [fall] below the *Dunlop* standard. *Our review of the relevant circumstances indicates that neither Commodities nor Lubienski were delinquent in filing their motion to intervene. Accordingly, we hold that the district court abused its discretion in ruling that Commodities and Lubienski's motion to intervene was untimely.*

7 F.3d at 502-503 (emphases added).

Thus, the Sixth Circuit previously concluded that the district court abused its discretion when it did not consider *all relevant* circumstances, which included (i) *the date the proposed intervenor became aware of the actual terms of the proposed settlement*; (ii) *the date the motion to intervene was filed*; and (iii) the Government's changes of position. *Id.* In this case, DIBC filed objections to the settlement within six days and moved to intervene within five weeks of discovering the terms of the $14.9 million Commodities settlement and the Government's renewed claim that DIBC was obliged to pay that amount to the Government. Thus, DIBC did not know the magnitude of the threat that the Commodities settlement posed to its interests until the exorbitant settlement figure was disclosed in November, 2001, and the Government's renewed threat to seek indemnification for that amount from DIBC.

Finding DIBC's motion to intervene untimely contravenes Sixth Circuit precedent because it fails to consider the same circumstances considered relevant in the 1993 Opinion. *Beckert v. TPLC*, 221 F.3d 870, 882 (6th Cir. 2000).

CONCLUSION

The petition for writ of certiorari to the Sixth Circuit should be granted. The panel's majority opinion conflicts with the holding of the Court in *Owen Equipment & Erection Co.*, conflicts with the decisions of other circuit courts, and is without precedent in the Sixth Circuit. Furthermore, concurring opinion's reasoning in support of the result is contrary to an earlier decision of the Sixth Circuit concerning the same parties. The Court should reverse the Sixth Circuit panel for these reasons.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 02-1591

[Filed August 19, 2004]

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)
v.	)
CERTAIN LAND SITUATED IN THE CITY OF DETROIT, WAYNE COUNTY, MICHIGAN, ET AL., Defendants,	)
DETROIT INTERNATIONAL BRIDGE COMPANY, Proposed Intervenor-Appellant,	)
COMMODITIES EXPORT COMPANY, ET AL., Defendants-Appellees.	)

BEFORE: NORRIS, BATCHELDER, and COLE, Circuit Judges.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 02-1591

[Filed March 9, 2004]

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CERTAIN LAND SITUATED IN THE CITY OF DETROIT, WAYNE COUNTY, MICHIGAN; 0.74 ACRE OF LAND, MORE OR LESS, SITUATED IN THE CITY OF DETROIT, WAYNE COUNTY MICHIGAN, et al.,
Defendants,

DETROIT INTERNATIONAL BRIDGE CO.,
Proposed Intervenor-Appellant,

COMMODITIES EXPORT COMPANY; WALTER H. LUBIENSKI,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit
Nos. 79-73934; 96-75494; 96-75495; 01-70391
Gerald E. Rosen, District Judge

Before: NORRIS, BATCHELDER, and COLE, Circuit Judges.

OPINION

ALAN E. NORRIS, Circuit Judge. Proposed intervenor Detroit International Bridge Co. ("DIBCO") appeals from the denial of its motion to intervene of right. It sought to intervene as a defendant in a condemnation action in which the condemned land was owned by a third party. The district court denied DIBCO's motion for failure to meet the requirements of intervention of right under Fed. R. Civ. P. 24(a). We conclude that intervention was improper because the district court lacked jurisdiction to hear DIBCO's underlying claim.

In 1979, the United States determined to expand a Detroit customs facility and commenced a condemnation action against DIBCO's land. DIBCO challenged the condemnation. In 1991, the United States and DIBCO agreed to settle the condemnation proceeding. They agreed to a memorandum of agreement ("MOA") under which the United States agreed to enlarge the scope of its expansion and condemn third party property, including the totality of a lot owned by Commodities Export Co. and Walter H. Lubienski ("Commodities"). DIBCO agreed to compensate the United States for the costs of condemnation. DIBCO claims that the MOA gave it the right to be consulted regarding the costs of condemnation, and that it only required DIBCO to pay

condemnation costs that were reasonable in light of federal regulations.

In 1996, the United States brought a condemnation action against Commodities. DIBCO's counsel was in attendance at conferences in that action at which the United States indicated that it would not seek to condemn the entirety of Commodities' land. DIBCO regarded the failure to condemn all of Commodities' land as a breach of the MOA, but it did not seek to intervene in this condemnation proceeding. Instead, DIBCO sought to reopen the 1979 condemnation action on the grounds that the MOA had been breached. The 1979 action went to trial, and on February 21, 2002, a jury awarded DIBCO nearly $4.1 million in compensation for its land.

In the meantime, the United States changed its position regarding Commodities' land and in 2001 commenced a new condemnation proceeding against the entirety of Commodities' property. DIBCO again failed to intervene. DIBCO contends that it had no reason to intervene until November of 2001, when it learned that the United States and Commodities had entered a settlement under which the United States would compensate Commodities in the amount of $14.9 million, far in excess of the $366,000 at which its land had been appraised, and after the United States indicated that it may seek to enforce the MOA against DIBCO. On December 28, 2001, DIBCO brought this motion to intervene in this condemnation proceeding, seeking declaratory and injunctive relief from enforcement of the MOA, and seeking to challenge the grant of a motion to vacate an opinion that allowed Commodities' valuation testimony.

The district court denied DIBCO's motion to intervene of right for failure to meet the requirements of Fed. R. Civ. P.

24(a). DIBCO appeals that finding. We affirm the district court's denial because the district court lacked jurisdiction to hear DIBCO's underlying claim.

This court is under an "independent obligation to police its own jurisdiction," regardless of whether the parties challenged jurisdiction. *SEC v. Basic Energy & Affiliated Res., Inc.*, 273 F.3d 657, 665 (6th Cir. 2001). We lack appellate jurisdiction where the district court lacked subject matter jurisdiction. We review the district court's exercise of subject matter jurisdiction *de novo*. *Care Choices HMO v. Engstrom*, 330 F.3d 786, 788 (6th Cir. 2003).

The district court could not permit intervention under Rule 24(a) because it lacked subject matter jurisdiction over DIBCO's underlying claim. DIBCO sought declaratory and injunctive relief against the United States, and the United States had not waived its sovereign immunity to such a claim. No statute waives the United States' sovereign immunity from contract claims for declaratory or injunctive relief in district court. DIBCO argues that the district court had subject matter jurisdiction to hear its claim under 28 U.S.C. § 1367. That statute provides in part as follows:

> Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

28 U.S.C. § 1367(a). This provision does not constitute a waiver of sovereign immunity. "A waiver of sovereign immunity must be unequivocally expressed in the statutory text . . . and will not be implied." *Lane v. Pena*, 518 U.S. 187, 192, 116 S. Ct. 2092, 135 L. Ed. 2d 486 (1996) (citations omitted). "Moreover, a waiver of the Government's sovereign immunity will be strictly construed, in terms of scope, in favor of the sovereign." *Id.* (citing *United States v. Williams*, 514 U.S. 527, 531, 115 S. Ct. 1611, 131 L. Ed. 2d 608 (1995)). The statute that DIBCO cites does not "unequivocally express" an intent to waive sovereign immunity, and therefore cannot constitute a grant of subject matter jurisdiction over DIBCO's claim.

The district court also lacked subject matter jurisdiction over DIBCO's underlying claim because it was presented as grounds for a motion to intervene in a condemnation proceeding. Because DIBCO seeks to intervene to assert a claim against the United States, it seeks to intervene as a defendant in the condemnation proceeding. Federal Rule of Civil Procedure 71A(e) describes the types of defense pleadings permitted in a condemnation proceeding:

> **Appearance or Answer**. If a defendant has no objection or defense to the taking of the defendant's property, the defendant may serve a notice of appearance designating the property in which the defendant claims to be interested. Thereafter, the defendant shall receive notice of all proceedings affecting it. If a defendant has any objection or defense to the taking of the property, the defendant shall serve an answer within 20 days after the service of notice upon the defendant. The answer shall identify the property in which the defendant claims to have an interest, state the nature and extent of the

> interest claimed, and state all the defendant's objections and defenses to the taking of the property. A defendant waives all the defenses and objections not so presented, but at the trial of the issue of just compensation, whether or not the defendant has previously appeared or answered, the defendant may present evidence as to the amount of the compensation to be paid for the property, and the defendant may share in the distribution of the award. No other pleading or motion asserting any additional defense or objection shall be allowed.

The Rule evidences that district courts only have jurisdiction to hear defenses and objections from defendants in condemnation cases. A district court lacks jurisdiction to hear counterclaims against the United States in condemnation cases. *United States v. Banisadr Bldg. Joint Venture*, 65 F.3d 374, 380 (4th Cir. 1995).

In addition, case law indicates that even a party that holds a property interest in the taken land could not present a contract claim in a condemnation proceeding against its own property. *Id.* at 380. Therefore, DIBCO, which lacks any property interest in Commodities' land, is also barred from asserting a contract claim in a condemnation proceeding, and the district court had no subject matter jurisdiction to hear DIBCO's claim.

Even if DIBCO asserts that it seeks to intervene solely to challenge the reasonableness of the settlement amount, a basis for intervention which could be classified as a defense or objection, it would still not fall within the class of pleadings that a district court has jurisdiction to hear in a condemnation proceeding. Rule 71A(e) requires that the defendant "identify the property in which the defendant claims to have an

interest[.]" Fed. R. Civ. P. 71A(e). The Rule thus evidences that a district court only has jurisdiction to entertain defenses and objections from parties who could assert property interests in the condemned land. DIBCO holds no property interest in Commodities' land, and the district court lacked subject matter jurisdiction to hear its purported defense or objection.

For the foregoing reasons, the judgment of the district court is **AFFIRMED**.

CONCURRENCE

R. GUY COLE, JR., Circuit Judge, concurring. I concur only in the judgment of the majority's opinion affirming the district court's denial of DIBCO's motion to intervene as of right pursuant to Fed. R. Civ. P. 24(a)(2). I would affirm the denial of DIBCO's motion to intervene on the ground that the district court did not abuse its discretion in finding that DIBCO's motion pursuant to Fed. R. Civ. P. 24(a)(2) was untimely.

The majority opinion fails to reach the Rule 24(a)(2) factors and instead concludes that DIBCO's motion to intervene as of right was properly denied because the district court lacked jurisdiction to hear DIBCO's "underlying claim." The majority opinion, however, fails to take into account the fact that DIBCO asserted *two* grounds for intervention, the first concerning (and seeking a declaratory judgment concerning) its duty to reimburse the Government for the settlement of the Commodities condemnation pursuant to the MOA, and the second concerning the reasonableness of the settlement amount agreed to between the Government and the Commodities defendants. In other words, because DIBCO faces being the *de facto* remunerator for the properties, it

sought to intervene in order for the district court to adjudge (1) whether or not it was liable as such a remunerator pursuant to the MOA and (2) whether the $14.9 million settlement agreed upon between the Government and the defendants was reasonable.

In grounding its decision concerning a motion to intervene as of right in questions of independent jurisdiction, the majority turns a blind eye to the longstanding principle that intervention as of right pursuant to Rule 24(a)(2) requires no independent ground of jurisdiction to support the applicant's claim. 32A AM. JUR. 2d Federal Courts § 700 (2003); James Wm. Moore et al., 6 MOORE'S FEDERAL PRACTICE § 24.22 (3rd ed. 1998); Charles Alan Wright et al., FEDERAL PRACTICE AND PROCEDURE § 1917 (2nd ed. 1986); *see also International Paper Co. v. Inhabitants of Town Jay, Me.*, 887 F.2d 338, 346 (1st Cir. 1989) (parties entitled to intervention as of right fall within a federal court's ancillary jurisdiction; no independent basis of jurisdiction is necessary); *Curtis v. Sears, Roebuck & Co.*, 754 F.2d 781 (8th Cir. 1985) (same). Only where intervention is permissive, pursuant to Rule 24(b), must independent jurisdictional grounds be shown. MOORE'S FEDERAL PRACTICE § 24.22 (3rd ed. 1998). But intervenors as of right – the category in which DIBCO claims to belong – need not show independent jurisdictional grounds because the court has supplemental jurisdiction over their claims. *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 376 n. 18, 98 S. Ct. 2396, 57 L. Ed. 2d 274 (1978). It is unclear why the majority forgoes an analysis under Rule 24(a)(2). Moreover, our circuit has never dismissed a case pursuant to Rule 24(a)(2) for lack of an independent basis for jurisdiction – indeed, it seems that no federal court of appeals has ever done so.

Jurisdiction to hear claims by intervenors of right depends only upon the court's jurisdiction to hear the primary, underlying action and the terms of supplemental jurisdiction set forth in 28 U.S.C. § 1367. DIBCO easily satisfies that standard here: as the potential remunerator for the property at issue, its claims are "so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." 28 U.S.C. § 1367. There is no dispute that the district court had jurisdiction to hear the action between the United States and the Commodities defendants. Accordingly, the "inquiry into the substantiality of the claimed interest" by DIBCO "is necessarily fact specific" and tied only to the factors enumerated in Rule 24(a)(2), that is, the extent of DIBCO's interest in the subject of the action and the extent to which not intervening may impair or impede DIBCO's ability to protect that interest. *Id.*

Not only does the majority opinion erroneously conclude that DIBCO was required to demonstrate an independent basis for jurisdiction in order to intervene pursuant to Rule 24(a)(2), but it also grounds that conclusion in a theory of sovereign immunity that runs contrary to legal authority. The majority concludes that "[n]o statute waives the United States' sovereign immunity from contract claims for declaratory or injunctive relief in district court." Yet as a general proposition, irrespective of a statutory provision waiving sovereign immunity, the "government consents to be sued . . . by those with whom it has privity of contract." *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1289 (Fed. Cir. 1999) (quoting *Erickson Air Crane Co. of Wash. v. U.S. Dep't of the Air Force*, 731 F.2d 810, 813 (Fed. Cir. 1984). DIBCO was in privity of contract with the Government by virtue of the MOA and, as such, our circuit recognizes that a district court would have jurisdiction over such an action for equitable or injunctive relief. *See*

Veda, Inc. v. United States, 111 F.3d 37 (6th Cir. 1997). At the very least, the privity-of-contract question follows, rather than precedes, the Rule 24(a)(2) determination.

Even if the Government had not waived its sovereign immunity, DIBCO would still be permitted to intervene because DIBCO's attempt to have its voice heard with respect to the settlement amount is not a counterclaim at all. The district court would have jurisdiction to entertain DIBCO's concerns relating to the reasonableness of the settlement amount in the same way that it would have jurisdiction to entertain objections by the Commodities defendants concerning the reasonableness of the settlement amount.

The majority opinion also errs in its Rule 71A analysis. The majority concludes that DIBCO has failed to assert an "objection" to the amount of the settlement. However, DIBCO's objection to the settlement amount and its attempt to have a voice in the settlement's ultimate value is the explicit basis for its motion to intervene. Furthermore, the majority opinion's conclusion that district courts lack jurisdiction to determine anything other than the condemnor and condemnee's interests in a condemnation action has no support in the law of our circuit or in the plain language of Rule 71A(e). To the contrary, it is recognized that Rule 71A(e)is not exhaustive of all parties who might become defendants in a condemnation proceeding: "Since there is no provision in Rule 71A for intervention, Rule 24's standard governs." 13 MOORE'S FEDERAL PRACTICE § 71A.04[2][b] (3rd ed. 1998). Moreover, Rule 71A(e) is not a jurisdictional bar to the district court's consideration of the intervention motion and the majority opinion fails to present any binding authority or legal reasoning otherwise. Although case law may support the proposition that only condemnees may be *compensated* pursuant to a condemnation action, there is no

legal authority barring a party's intervention as a defendant where, as is the case here, a proposed defendant-intervenor has a legitimate basis for objecting to the settlement amount.

Indeed, the only authority the majority cites for its proposition that only condemnors or condemnees may intervene as defendants in condemnation proceedings is *United States v. Banisadr Bldg. Joint Venture*, 65 F.3d 374, 380 (4th Cir. 1995). Not only is *Banisadr* not binding upon this Court, but the Fourth Circuit itself conceded (in the very passage referred to by the majority) that the case law on which it relied was "sparse" and only "suggest[ed]" that a contract claim could not be asserted in a motion to intervene in a condemnation proceeding. *Id.* Indeed, the case law upon which the Fourth Circuit itself relied was a lone district court opinion from 1977. Finally, it is worthwhile to note that no subsequent Fourth Circuit panel, district court, or other federal court of appeals has ever cited *Banisadr* for the proposition for which the majority now invokes it as decisive legal support for its novel conclusions.

Here, the Government and the Commodities defendants intend to settle for $14.9 million – an amount for which the Government may seek to hold DIBCO liable. Even though DIBCO seeks no compensation, it could appropriately intervene as a defendant to challenge the settlement amount for which it might be responsible, so long as it satisfies the requirements for intervention set forth in Rule 24(a)(2). A case such as this one, however rare it may be, is paradigmatic of an appropriate instance in which to permit a party to intervene as a defendant in a condemnation proceeding where that party is not a condemnee.

Having determined that independent jurisdiction is immaterial to our consideration of DIBCO's motion to

intervene as of right, I turn now to the relevant analysis pursuant to Fed. R. Civ. P. 24(a)(2). In order to intervene as of right pursuant to Rule 24(a)(2), DIBCO had to establish: (1) the timeliness of its application to intervene; (2) a substantial legal interest in the Commodities/Lubienski condemnation cases; (3) impairment of its ability to protect that interest in the absence of intervention; and (4) inadequate representation of that interest by parties already before the court. *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997) (citations omitted). The condemnation actions at issue were filed in 1996; DIBCO did not move to intervene until 2001. The district court found that DIBCO's motion to intervene was untimely and denied its motion to intervene as of right on that basis. The district court's timeliness decision is reviewed for an abuse of discretion. *Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir. 1989).

The timeliness prong of Rule 24(a)(2) requires the movant to file its motion to intervene promptly after discovery of its interest in the litigation. *United States v. Tennessee*, 260 F.3d 587, 594 (6th Cir. 2001). DIBCO contends that its responsibility to timely intervene arose on November 15, 2001, when it learned the amount of the Commodities defendants' recent settlement with the Government – that is, when DIBCO learned the amount of its potential liability pursuant to the MOA. The district court, however, properly concluded that DIBCO should have moved to intervene within a reasonable period after December 12, 1996, which is when DIBCO received notice that the first two condemnation suits had been filed. In short, 1996 was when DIBCO learned of the *fact* of its potential liability under the MOA. It should have intervened then, and not waited until it learned the *amount* of that potential liability in 2001. *See Stotts v. Memphis Fire Dep't*, 679 F.2d 579, 584 & n.3 (6th Cir. 1982) (applicants for intervention "should have attempted to

intervene when they first became aware of the action, rather than adopting a 'wait-and-see' approach.").

Accordingly, the district court did not abuse its discretion in finding DIBCO's motion to intervene untimely. Although I would find that DIBCO – as the potential remunerator for the hefty $14.9 settlement reached between the Government and the Commodities defendants – easily satisfies the remaining requirements for intervention, the untimeliness of its motion is fatal. I would therefore affirm the district court's denial of DIBCO's motion to intervene on that basis alone.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

79-CV-73934-DT
96-CV-75494-DT
96-CV-75495-DT
01-CV-70391-DT

[Filed February 27, 2002]

UNITED STATES OF AMERICA, Plaintiff,	)
v.	)
CERTAIN LAND SITUATED IN THE CITY OF DETROIT, et al., Defendants.	)

OPINION AND ORDER DENYING DEFENDANT DETROIT INTERNATIONAL BRIDGE COMPANY'S MOTION TO INTERVENE

At a session of said Court, held in the U.S. Courthouse, Detroit, Michigan on 27 FEB 2002

PRESENT: Honorable Gerald E. Rosen
United States District Judge

I. INTRODUCTION

Detroit International Bridge Company ("DIBCO") is the principal defendant in *United States v. Certain Land*, No. 79-CV-73934-DT, a condemnation action for the taking by the Government of two parcels of property totaling approximately 3.75 acres of land owned by DIBCO. On December 28, 2001, DIBCO filed a Motion to Intervene in *United States v. 0.41 Acres of Land, et al.*, No. 96-CV-75494-DT; *United States v. 0.074 Acres of Land, et al.*, No. 96-CV-75495-DT; and *United States v. 0.41 Acres of Land, et al.*, No. 01-CV-70391-DT. These three condemnation actions concern two parcels of property owned by Walter Lubienski and Commodities Export Company (referred to herein as the "Commodities Defendants".)

The Government and the Commodities Defendants responded to DIBCO's Motion on January 14 and January 16, 2002, to which responses DIBCO replied on February 4, 2002. Having reviewed and considered the parties' briefs and the entire record of these cases, the Court has determined that oral argument is not necessary. Therefore, pursuant to Local Rule 7.1(e)(2), this matter will be decided "on the briefs." This Opinion and Order sets forth the Court's ruling.

II. FACTUAL BACKGROUND

In 1979, the United States Government initiated condemnation proceedings against the Detroit International Bridge Company and others for the taking of three parcels of property totaling less than 4 acres of land for the expansion of the U.S. Customs cargo inspection facility on the American side of the Ambassador Bridge. The two largest of those

parcels were owned by DIBCO.[1] The Government's taking of these two parcels was hotly contested by DIBCO from the inception of the action. However, in 1991, the United States (through the General Services Administration) entered into a Memorandum of Agreement (the "MOA") with DIBCO to settle the 1979 condemnation proceedings.

Although the stated purpose of the MOA was the settlement of the 1979 eminent domain action, the Agreement actually went beyond the scope of the expansion of Customs facilities contemplated by the original Declaration of Taking and beyond the physical boundaries of DIBCO's property. Pursuant to the MOA, the Government agreed to a much larger expansion of the federal project and, accordingly, called for the future condemnation of other neighboring properties.

The MOA called for the Government to pay DIBCO $1.24 million as compensation for the two parcels of land owned by DIBCO which were being condemned in the 1979 action. DIBCO, in turn, agreed to pay the Government for certain "Incremental Costs" arising out of revisions to the proposed federal project, including costs of acquisition of other properties within the "Expanded GSA Site."[2] Among these

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[1] The third parcel a strip of undeveloped land of less than 1/10 acre that was situated between the two DIBCO parcels was owned by an individual named Nash Sogoian. A Stipulation and Judgment was entered on September 17, 1987 with regard to Sogoian's parcel pursuant to which Sogoian was paid $35,000.00 for his property.

[2] With respect to DIBCO's responsibility for "incremental costs", the MOA provided as follows:

(6.1.3) DIBC agrees to compensate GSA and make GSA

"whole" for all Incremental Costs incident to and arising out of revisions to the proposed Federal Project as follows:

(6.1.3.1) Costs related to the completion of a Supplemental Environmental Impact Statement necessary to implement the Approved Plan on the Expanded GSA Site.

(6.1.3.2) Costs for the acquisition of the Expanded GSA Site, which costs shall be defined as all costs incurred by the Federal Government in obtaining unencumbered fee-simple title in the Expanded GSA Site, excluding the area of the GSA Site. Said title shall be subject to the approval of the Attorney General. Such costs shall include, but not be limited to, site acquisition costs (whether by voluntary conveyance or by eminent domain, including all settlement and interest costs paid by the Federal Government), site appraisal costs, title evidence costs, site survey costs, and the cost of relocation services as provided for under the Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970, as amended (P.L. 91-646), for affected individuals, businesses and utilities.

(6.1.3.3) All contractual design and construction costs resulting from requests by DIBC for modifications to the Federal Project.

* * *

(6.1.5) DIBC's compensation obligation shall continue until the Federal Government has: acquired fee simple title to the Expanded GSA Site whether said title is acquired through voluntary conveyances, or through stipulations for settlement or final judgements [sic], including appeals therefrom, of all eminent domain proceedings for such acquisitions, including all relocation assistance; and completed construction of all construction contracts. . . .

(6.1.6). . . In the event that the actual amount of Incremental Costs exceeds the amount secured by DIBC's irrevocable letter of credit, GSA shall provide DIBC with written notice of that amount. If it is subsequently determined by mutual agreement of the parties hereto or by an order of a court of competent jurisdiction that DIBC is obligated to pay that amount to GSA and DIBC fails to pay that amount within thirty (30) days after such determination or after the expiration of all periods of appeal from any such court order, DIBC shall be deemed to have forfeited all rights, privileges, and property interests conferred upon DIBC or to which DIBC is entitled under the terms of this Agreement.

* * *

(8.2). . . [T]he obligation of DIBC for compensation to GSA of Incremental Costs for services shall not exceed the price which is determined to be fair and reasonable pursuant to the applicable Federal procurement regulations. . .

With respect to the effect and binding nature of the terms of the MOA, the Agreement further provides:

(8.3) It is intended by the parties that this lawsuit, Civil NO. 79-73934, be settled by the payment of just compensation in the amount agreed to in this Agreement and in the Stipulation of Settlement which will be drafted based upon this Agreement; and it is agreed that the issue of just compensation may not be reopened based on any alleged breach of the Stipulation of Settlement. It is further agreed that DIBC waives any further claims it may have for attorney fees, costs or damages arising from this lawsuit and any alleged breach of this Agreement or the Stipulation of Settlement. However, the parties agree that they shall

other properties designated for condemnation under the MOA were two adjacent parcels of land owned by Walter Lubienski and Commodities Export Company. Commodities operates a duty-free store on one of these parcels. Mr. Lubienski is the owner of Commodities as well as of the adjacent parcel of vacant land.

Upon learning of the terms of the MOA in December 1991 after obtaining a copy of the Agreement through the Freedom of Information Act, Commodities and Lubienski moved to intervene in the 1979 action. Although this Court denied the motion, the Sixth Circuit Court of Appeals reversed that decision and directed this Court to permit Commodities and Lubienski to intervene.

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have the right to apply to the United States District Court for the Eastern District of Michigan for enforcement of this Agreement of of the Stipulation of Settlement. But it is understood and agreed that such application for relief shall constitute an entirely independent and separate cause of action from this lawsuit. It is intended by the parties that Civil Action 79-73934 be entirely concluded by the entry of final judgment and may not be reopened based on any alleged breach of this Agreement or Stipulation of Settlement, and shall not in any way change or modify the amount agreed upon as just compensation.

(8.4) It is understood by the parties that all agreements between GS and DIBC as consideration for settlement of this litigation are subject to the review of the Attorney General and although settlement by utilizing said Agreement will be recommended, entry of a stipulation cannot be guaranteed. It is further understood that DIBC shall not be bound by this Agreement until and unless GSA is so bound. . . .

The Court of Appeals specifically found Commodities' and Lubienski's intervention in the action proper because the MOA provided for condemnation of their property and this Court's approval of the Agreement would, as a practical matter, impede Commodities' and Lubienski's ability to protect their interest in their own land without their having any input in the matter unless they were permitted to participate as intervening defendants. *See United States v. Detroit Int'l Bridge Co.*, 7 F.3d 497, 500-503, 505 (6th Cir. 1993). Thereafter, DIBCO, Commodities and Lubienski proceeded for the ensuing five years to litigate in this Court the issue of validity of the MOA and the merits of Commodities' claim for injunctive relief to enjoin implementation of that Agreement. These issues were finally decided by the Court's March 1999 ruling on the parties' cross-motions for summary judgment.

Meanwhile, although the Government conceded all along since 1992 that the MOA provided not only for the settlement of the 1979 condemnation action for the taking of DIBCO's property but also provided for the future condemnation of area of land which included property owned by Commodities and Lubienski, it was not until 1996 that the Government actually initiated eminent domain proceedings to take their properties. By that time, however, the Government had decided not to condemn Commodities' entire property, but rather to take only a small corner of the store's parking lot in fee, and an easement over the parking lot for ingress and egress to a to be constructed Government parking facility on adjacent land, and its Complaint and Declaration of Taking filed on December 5, 1996 reflects this small partial taking. *See United States v. 0.074 Acres of Land*, Civil Action No. 96-CV-75495-DT.

That the Government decided in 1996 not to take Commodities entire property should have come as no surprise to DIBCO because since May of 1993, i.e., shortly after oral argument before the Sixth Circuit Court of Appeals in Commodities' and Lubienski's appeal of the denial of their motion to intervene, the Government time and again avowed, both in pleadings and in on-the-record hearings that it only intended to take a small portion of Commodities' property. *See e.g.*, Plaintiff's July 18, 1994 Supplemental Brief in Opposition to Intervenor's Motion for Preliminary Injunction:

> [I]t has been GSA's expressed intention since May of 1993 to confine the proposed condemnation to the portion of Commodities' property depicted in Exhibit A.. . . . GSA intends to condemn only a small portion of the parking lot in fee, for the truck ramp [to the cargo inspection facility.] GSA intends to condemn an additional easement for ingress and egress to a government employee parking lot. The easement would be open at all times to Commodities for its own use. The government parking lot will be constructed on property adjacent to Commodities property. . . .

7/18/94 Supp. Brief, p. 2.

The Government reiterated its intent to take only a small "slice" of Commodities' parking lot at the October 15, 1998 hearing on the parties' cross motions for summary judgment concerning the validity of the MOA. At that hearing, in response to questioning by the Court, GSA's representative Tom Malkin stated:

> THE COURT: You have no contemplation of condemning -- you, GSA, has no contemplation of condemning Mr. Lubienski's entire property?

MR. MALKIN: We do not.

THE COURT: You do not intend to do that?

MR. MALKIN: No.

* * *

THE COURT: You intend to take the back four blocks [i.e., adjacent property owned by Lubienski]. But you have no contemplation of taking his store property, the Commodities property?

MR. MALKIN: Not the entire property. Just a slice, a slice of the parking lot.

[10/15/98 Hrg. Transcript pp. 70-71.]

Apparently, it was as a result of the Government's decision not to condemn all of Commodities' property and the October 15, 1998 affirmative on-the-record statements of Mr. Malkin attesting to that fact that DIBCO took the position that the MOA was no longer a binding agreement. *See* DIBCO's "Supplemental Brief in Opposition to Intervenors' Motion for Summary Judgment and in Support of DIBC's Cross-Motion for Summary Judgment," p. 4. *See also* the Government and DIBCO's 12/1/00 "Joint Motion to Reschedule Filing of Pretrial Order and Conference," p. 3. Although the Government did for a period of time continue to assert that the MOA remained an enforceable agreement, as of December 4, 2001, the Government's position was also that the MOA is null and void.

Meanwhile, following the Court's decision on the parties' cross-motions for summary judgment, the Government

reversed its decision to take only a small slice of Commodities' property, and on January 29, 2001, filed a new Condemnation Complaint and Declaration of Taking, taking Commodities' property in its entirety. *See, United States v. 0.41 Acres of Land, et al.*, No. 01-70391. The complete taking of Commodities did not, however, alter the parties stated positions that the MOA was no longer in effect.

There being no settlement of the 1979 case pursuant to the MOA, the matter was scheduled for trial. Meanwhile, the Commodities parties and the Government indicated their desire to pursue settlement options and were granted leave by the Court to participate in a settlement conference supervised by a magistrate judge. That settlement conference proved helpful and the Government and Commodities ultimately settled the dispute over the taking of Commodities' and Walter Lubienski's two parcels of land.

Upon being advised of the tentative settlement reached by Commodities, Lubienski and the Government, the Court convened a pretrial/settlement conference on November 15, 2001 with all of the Parties involved in all four of the condemnation actions.[3] The Commodities parties put their agreed upon settlement of the 1996 and 2001 actions on the record on that date. Pursuant to their agreement, the Government agreed to pay Commodities and Lubienski

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[3] An Order consolidating all four cases for trial was entered on August 1, 2001. However, because of Commodities' intervention in the 1979 action for purposes of challenging the validity of the MOA, counsel for the parties, however, appeared together for numerous hearings and for in-chambers conferences even before the cases were officially consolidated, particularly through 1999 when the Court rendered its decision on the parties' cross-motions for summary judgment on the issue of the MOA's validity.

$14,900,000.00 as just compensation for their two parcels of property.[4]

Settlement negotiations between the Government and DIBCO on that date, however, were not successful. The position of the Government and DIBCO being that the MOA was null and void, the Court set the 1979 action regarding the taking of DIBCO's property for trial on the issue of just compensation due to DIBCO. Trial was originally scheduled to commence on December 4, 2001 but was adjourned upon the request of counsel for DIBCO until February, 2002.

The 1979 DIBCO action was tried before a jury on February 8 - 19, 2002. After two days of deliberation, the jury returned a verdict, and a Judgment was entered upon the jury verdict awarding DIBCO $4,098,174.00, plus interest, as just compensation for the DIBCO property taken by the Government.

Meanwhile, following the appearance of counsel in chambers on December 4, 2001(the date on which trial was originally scheduled to commence), on December 28, 2001, DIBCO filed the instant Motion to Intervene in the 1996 and 2001 Commodities/Lubienski cases. The basis of DIBCO's motion to intervene is its belief that the Government might require DIBCO to reimburse it for the settlement of the 1996

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[4] The Government and the Commodities parties stipulated that their settlement was conditioned upon the Court granting their joint motion to vacate its July 13, 2001 Opinion and Order Regarding Plaintiff's Motion *in Limine* to Exclude Commodities' Valuation Testimony.

and 2001 Commodities and Lubienski property takings.[5] DIBCO contends that if it is found to be responsible for such reimbursement, then it has an interest in the Commodities/Lubienski settlement which it will be unable to protect unless it is granted leave to intervene.

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[5] DIBCO states that the Government threatened to impose responsibility for reimbursement from DIBCO for amounts paid to Commodities by the Government during settlement discussions which took place out of the Court's presence on November 15, 2001. The Government, however, explains that during the settlement talks, the Government and DIBCO attempted to undertake a global settlement, which would involve settling the issue of just compensation as well as matters beyond the scope of the condemnation action. The Government states that it

> "mentioned the possibility of seeking repayment from DIBCO to protect its interests only after DIBCO threatened to sue the United States for breach of contract. . . . Counsel for Plaintiff [the Government] made this statement only in response to a threatened to sue made by counsel for Defendant DIBCO. Since the conclusion of the settlement conference, Plaintiff has taken no formal legal action to seek recovery from Defendant DIBCO for payment of the settlement."

See "Plaintiff's Brief in Support of Consolidated Opposition to Defendant's Motion to Intervene and Plaintiff's Motion to Dismiss DIBCO's Claims and Defenses of Intervention," p.7 n. 1 (emphasis in original).

The Government's statements in its Brief are consistent with the statements repeatedly made by counsel for the Government during in-chambers conferences -- that if DIBCO would "leave it alone," the Government was willing to "walk away" from any further litigation.

On the same date that it filed its Motion to Intervene, December 28, 2001, DIBCO also initiated a separate lawsuit for declaratory and injunctive relief, *Detroit International Bridge Company v. United States of America, acting through the General Services Administration*, No. 01-CV-75015-DT. In its Complaint, DIBCO argues that

> 20. Pursuant to the MOA. . . the Government was required and duty bound to acquire the property of Commodities Expert [sic; Export] Company ("CEC") and other properties as part of the Expanded GSA site.
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> * * *
>
> 22. The Government, acting through GSA, breached the MOA by failing to acquire or attempting to acquire all of the properties contemplated by the MOA. . . . Among other things, the Government affirmatively breached the MOA in 1996 by initiating a condemnation complaint against CEC wherein the Government only sought to acquire a small slice of CEC's property and where the MOA. . . required the Government to acquire all of the property of CEC within the Expanded GSA site.
>
> * * *
>
> 30. As a result of the Government's breach, the fundamental goals and objectives of the MOA are frustrated.
>
> 31. The Government's breach of the MOA extinguishes and relieves DIBC from its obligations under the MOA.

* * *

> WHEREFORE, Plaintiff respectfully request that this honorable court issue:
>
> a. A declaratory judgment decreeing that due to the breach of the MOA by the Government and the continuing and executory obligations of DIBC as stated in the MOA are extinguished; [and]
>
> b. That the United States and its agents, attorneys and employees, and each and ever one of them be permanently restrained and enjoined by order of this Court from enforcing or instituting proceedings to enforce the MOA against DIBC. . . .[6]

See, Complaint for Declaratory and Other Relief, Civ. No. 01-CV-75025-DT.

It is essentially these same claims that DIBCO proposes to assert as its Claims and Defenses in Intervention in the Commodities/Lubienski cases. *See* Exhibit A to DIBCO's Brief in Support of Motion to Intervene in Civil Nos. 96-CV-75494-DT, 96-CV-75495-DT, and 01-CV-70391-DT, pp. 3-4.

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[6] DIBCO also argues in its declaratory/injunctive relief action that its property was wrongfully transferred to the Government without payment of just compensation and therefore, its 1979 complaint in condemnation and declaration of taking should be declared null and void and that title should be quieted in favor of DIBCO.

III. DISCUSSION

The standards for intervention are set forth in Fed. R. Civ. Pro. 24:

> **(a) Intervention of Right**. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> **(b) Permissive Intervention**. Upon timely application, anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

DIBCO here argues that it is entitled to intervention as of right. *See* DIBCO's Brief in Support of Motion to Intervene, pp. 2-4. There being no statute which confers upon DIBCO an unconditional right to intervene, DIBCO's motion will be considered as arising under Fed. R. Civ. Pro. 24(a)(2).

To qualify for intervention as of right under Rule 24(a)(2), DIBCO must satisfy four criteria. It must establish: (1) timeliness of the application to intervene; (2) a substantial legal interest in the case; (3) impairment of its ability to protect that interest in the absence of intervention; and (4) inadequate representation of that interest by parties already before the court. *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997), citing *Cuyahoga Valley Ry. Co. v. Tracy*, 6 F.3d 389, 395 (6th Cir. 1993). *See also*, *United States v. Detroit Int'l Bridge Co.*, *supra*, 7 F.3d at 499. Failure to meet [any] one of the four criteria will require that the motion to intervene be denied. *Id.*, quoting *Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir. 1989). *See also*, *Stupak-Thrall v. Glickman*, 226 F.3d 467, 471 (6th Cir. 2000).

1. DIBCO'S MOTION IS NOT TIMELY

In *United States v. Tennessee*, 260 F.3d 587, 591-92 (6th Cir. 2001), the Sixth Circuit identified five factors to be guide lower courts in deciding the timeliness issue:

> CMRA contends that now is the appropriate time to intervene and that it filed its motions timely because it learned shortly prior to bringing its motions that its interests were not being represented by the existing parties. We have identified several factors to be established in determining whether a request for intervention is timely:
>
> > (1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenor knew or reasonably should have known of his interest in the case; (4) the

> prejudice to the original parties due to the proposed intervenor's failure, after he or she know or reasonably should have known of his interest in the case, to apply promptly for intervention; and (5) the existence of unusual circumstances militating against or in favor or intervention.
>
> *Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir. 1989). The determination of whether a motion to intervene is timely should be evaluated in the context of all relevant circumstances. *Jansen [v. City of Cincinnati]*, 904 F.2d [336,] 340 [(6th Cir. 1990)].

260 F.3d at 592; *Jordan v. Michigan Conf. of Teamsters Welfare Fund*, 207 F.3d 854, 862 (6th Cir. 2000). Applying the foregoing factors to DIBCO's Motion to Interevene in this case, the Court finds that Defendant's Motion is not timely.

As set forth above, the Government and the Commodities Defendants have reached an agreement to settle the 1996 and 2001 Commodities/Lubienski condemnation actions. DIBCO maintains that its motion to intervene is timely-filed because it was filed six weeks after it learned of the settlement agreement, an agreement which, DIBCO contends calls for the payment by the Government of an unreasonably large sum of money and which it believes the Government will attempt to hold it responsible for pursuant to the MOA. It is based upon its alleged potential responsibility for the settlement to be paid by the Government to the Commodities Defendants that DIBCO contends it has an interest in the 1996 and 2001 Commodities/Lubienski cases.

DIBCO disputes its responsibility for payment of the settlement in the Commodities cases because of the

Government's prior material breach of the MOA. *See* Brief in Support of Defendant's Reply to Plaintiff's Opposition to Defendant's Motion to Intervene, p. 3, n. 4. Although carefully avoiding in any of its intervention briefs any explanation of precisely what that material breach is, DIBCO did specify the basis for its claims of breach of the MOA on the part of the Government in the Complaint for Declaratory Judgment and Other Relief that DIBCO filed contemporaneously with its filing of the Motion to Intervene in the Commodities/Lubienski condemnation actions.

As indicated, in its Complaint for Declaratory Judgment, DIBCO alleged that the Government was required and duty bound under the MOA to acquire the property of Commodities and that it affirmatively breached the MOA in 1996 by initiating a condemnation complaint against Commodities in which the Government sought to only to acquire a small slice of Commodities property rather than the property in its entirety. *See* Complaint for Declaratory Judgment and Other Relief, ¶¶ 20, 22. Based upon this alleged prior material breach, DIBCO seeks to intervene in this action to obtain entry of a declaratory judgment which "determine[s], declare[s] and adjudge[s] that DIBC[O] has no duty to reimburse the Government for settlement of [the Commodities/Lubienski condemnation cases] under the MOA." *See* DIBCO's proposed Claims and Defenses in Intervention, p. 3.

DIBCO's request for a declaratory judgment that the Government's decision to take only a slice of Commodities' property rather than to condemn all of the property constituted a material breach of the MOA which absolved DIBCO of any responsibility to reimburse the Government for the costs of acquisition of property within the Expanded GSA Site -- including for any settlement entered into with respect to

Commodities as well as with Mr. Lubienski for his property adjacent to Commodities -- could have been made by DIBCO in 1996 when the Government filed its 1996 Complaint and Declaration of Taking in Civil Action No. 96-CV-75495-DT which declared that the Government was taking of only a slice of Commodities' parking lot. DIBCO participated in numerous hearings and conferences subsequent to the filing of the 1996 action and was present in October 1998 when, in open court, GSA's representative, Tom Malkin, affirmatively stated on the record during the summary judgment hearing to determine the validity of the MOA that GSA had no intention of taking all of Commodities; that it only was going to take a slice of the parking lot. Thus, DIBCO "knew or reasonably should have known" of its purported interest in the Commodities/Lubienski condemnation cases if not in 1996, at least as of October 1998.

As the Sixth Circuit observed in affirming the district court's denial of a motion to intervene in *Stotts v. Memphis Fire Dept.*, 679 F.2d 579 (6th Cir.), *cert. denied*, 459 U.S. 969 (1982), the intervention applicants "should have attempted to intervene when [it] first became aware of the action, rather than adopting a 'wait-and-see' approach." 679 F.2d at 584 n. 3. This is precisely what DIBCO has done here. Assuming *arguendo* that DIBCO has an interest in the 1996 and 2001 actions, It has known of that interest for more than four years. It knew for more than four years that the Government was only going to condemn a small portion of Commodities' property in the 1996 action and, therefore, it knew for more than four years of the Government's alleged breach of the MOA. The only difference now is that, after taking a "wait-and-see" stance, DIBCO knows of the amount of just compensation to be paid to the Commodities Defendants. The basis of its arguments in avoidance of

responsibility for payment of that sum remains the same now as it did in 1996 and 1998.

Furthermore, intevention by DIBCO at this point would prejudice the other parties. As indicated, the Government ultimately reversed its decision to take only a small portion of Commodities' property and decided to take all of Commodities' property, after all. *See United States v. 0.41 Acres of Land*, No. 01-CV-70391-DT (Complaint and Declaration of Taking filed January 29, 2001). Therefore, DIBCO's principal reason for intervening in this case, i.e., to argue that it is excused from its obligations under the MOA because of the Government's material breach of the agreement by not taking all of Commodities' property, has evaporated. Moreover, the Government and the Commodities Defendants have settled the matter of just compensation for the complete taking of Commodities' and Lubienski's properties. The settlement contemplates a change of possession of the property on March 1, 2002. To this end and in reliance on the settlement, Commodities has begun the process of winding down its business and the Government has begun the process of preparing for the integration of Commodities' property into the federal project. To delay the settlement now "may force the parties into collateral litigation" over issues that need not arise. *See U.S. v. Tennessee*, 260 F.3d at 594.

Based upon the foregoing, the Court finds that DIBCO's Motion to Intervene in the 1996 and 2001 Commodities/Lubienski cases is not timely.

2. DIBCO DOES NOT HAVE A SUBSTANTIAL INTEREST IN THE COMMODITIES/LUBIENSKI CONDEMNATION CASES

A proposed intervenor must demonstrate that it has a "direct, significant, legally protectable interest" in the action into which he seeks to intervene. *United States v. Detroit Int'l Bridge Co.*, *supra*, 7 F.3d at 501. *See also*, *Grubbs v. Norris*, *supra*, 870 F.2d at 346 ("an intervenor must demonstrate that he or she has "a direct and substantial interest in the litigation"). This interest also must be "significantly protectable." *Diamond v. Charles*, 476 U.S. 54, 68 (1986).

DIBCO attempts to make out its claim of an interest in the Commodities/Lubienski condemnation actions by arguing that its position here is indistinguishable from that of Commodities and Lubienski when they sought, and were ultimately found to be entitled, to intervene in the 1979 action when settlement of that case was contemplated under the MOA. The Court of Appeals found that Commodities and Lubienski had a "direct, significant, legally protectable interest" in the subject matter of the 1979 action because "**the MOA clearly provide[d] for the condemnation of Commodities and Lubienski's property** and serve[d] as a final settlement of the 1979 condemnation action" brought by the Government for the taking of DIBCO's property. 7 F.3d at 501 (emphasis added). It was because Commodities and Lubienski faced condemnation of their own real property pursuant to the MOA (which was intended as a settlement agreement for the 1979 DIBCO condemnation action) that the Sixth Circuit found that Commodities and Lubienski had a substantial interest in the 1979 action.

Here, by contrast, DIBCO's alleged interest does not arise through the condemnation of the properties at issue in the

1996 and 2001 actions. Rather, its alleged interest is wholly contract-based and not related to the taking of any property involved in these cases. Although DIBCO attempts to make out an "interest" by presupposing that "it will" be responsible for the payment of the settlement of the Commodities/Lubienski actions, such a claim is wholly contingent upon the Government making a demand for such reimbursement and filing a lawsuit seeking repayment for the settlement amount, **and** further contingent upon the Government succeeding in persuading the court of the continued viability of the obligations of DIBCO under the MOA now that the principal purpose of that agreement -- the settlement of the 1979 action -- no longer exists. Absent a lawsuit, however, DIBCO's claimed interest is insufficient for demonstrating a direct, substantial interest under Rule 24. *See Washington Elec. Coop., Inc. v. Mass. Mun. Wholesale Elec. Co.*, 922 F.2d 92, 97 (2nd Cir. 1990) (an interest "that is contingent upon the occurrence of a sequence of events before it becomes colorable will not satisfy the rule"). *See also, Silver v. Babbitt*, 166 F.R.D. 418 (D. Ariz. 1994), *aff'd*, 68 F.3d 481 (9th Cir. 1995) (denying intervention because interest would not vest until the U.S. Fish and Wildlife Service undertook several post-litigation actions).

Moreover, DIBCO's motion to intervene is inconsistent with the purpose of Fed. R. Civ. Pro. 24. Rule 24 "is not intended to allow for the creation of whole new lawsuits by the intervenors." *Deus v. Allstate Ins. Co.*, 15 F.3d 506, 525 (5th Cir. 1994) (citing *Washington Elec. Coop., Inc., supra*). As the Second Circuit emphasized in the *Washington Electric* case, "Intervention cannot be used as a means to inject collateral issues into an existing action." 922 F.2d at 97. This is precisely what Defendant DIBCO is attempting to do in this case. DIBCO is attempting to adjudicate issues of contract interpretation which have nothing to do with the

condemnation of the parcels of real property at issue in the Commodities/Lubienski cases.

Further, to the extent that DIBCO argues an interest in the Commodities/Lubienski cases based upon the fact that the settlement in those cases contemplates the Court's vacating of its July 13, 2001 Valuation Order, DIBCO has cited no authority (nor has the Court independently found any such authority) standing for the proposition that an interest in the preservation of an interlocutory legal ruling -- which the court, in its discretion may modify or rescind at any time -- constitutes an "interest" for purposes of Rule 24. *See Jalapeno Property Management, L.L.C. v. Dukas*, 265 F.3d 506 (6th Cir. 2001) (the decision to modify or rescind its prior interlocutory orders is a matter which rests within the sound discretion of the court).

The July 13, 2001 Opinion and Order in question denied the Government's Motion *in Limine* filed in the 1996 Commodities "slice" case, to exclude evidence of the value of Commodities Export Company. The Opinion had nothing to do with DIBCO's valuation of its own property which was the subject of the 1979 action. The Opinion imposed no obligations on DIBCO and did not determine its rights, positively or negatively.

The issuance of an opinion and order does not create any vested right or interest in the opinion. As this Court stated in its Opinion and Order of December 27, 2001, a court has wide latitude to reconsider and vacate its prior opinions and orders. *See*, *United States v. Certain Land*, 178 F. Supp. 2d 792, 797-99, 804 (E.D. Mich. 2001). The July 13, 2001 Opinion and Order in question is interlocutory in nature and, as such, is subject to revision at anytime pursuant to Fed. R. Civ. Pro. 54(b). *Id. See also*, *John Simmons Co. v. Grier*

Brothers Co., 258 U.S. 82, 88 (1922) (court at any time prior to entry of final judgment may modify or rescind interlocutory orders). *Cf.*, *Clem v. Eribaum*, 584 F. Supp. 908 (E.D. Pa. 1984), *aff'd*, 770 F.2d 1067 (3rd Cir.), *cert. denied*, 747 U.S. 849 (1985) (ruling on motion *in limine* is interlocutory in nature).[7]

The foregoing discussion makes clear that DIBCO has no "direct, significant, legally protectable interest" in the Court's July 13, 2001 Opinion and Order such that it should be permitted to intervene in the Commodities/Lubienski condemnation actions to oppose the Court's vacation of the Opinion and Order.

3. DIBCO'S ABILITY TO PROTECT ITS ALLEGED INTEREST WOULD NOT IMPAIRED IN THE ABSENCE OF INTERVENTION

Assuming *arguendo* that DIBCO has demonstrated a protectable interest under Rule 24 by virtue of its potential responsibility for the payment of the settlement of the

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[7] Presumably, DIBCO's desire to prevent the vacation of the July 13, 2001 Opinion and Order was to argue it as the basis for admission of evidence of lost profits on the Ambassador Bridge in its own 1979 condemnation action. However, as the Court stated in refusing to allow DIBCO to admit such lost profits in the trial on the 1979 case, in the Commodities case -- which was the subject of the July 13, 2001 Opinion and Order -- it was because the Government's taking put Commodities out of business with no possibility of relocating the business to another site that the Court held that evidence of Commodities lost revenues would be admissible. That holding would have had no applicability in the DIBCO condemnation action where the Government's taking did not put the Ambassador Bridge out of business.

Commodities/Lubienski actions under the MOA, the third requirement for intervention as of right requires DIBCO to establish that without intervention in the Commodities/ Lubienski cases, its ability to protect this interest would be impaired. It is clear that DIBCO cannot meet this requirement because it has another avenue available to it -- and indeed, has already taken advantage of that avenue -- by filing a separate action in which it has raised the very same issues which it seeks to raise through intervention in this action. "Intervention generally is not appropriate where the applicant can protect its interests and/or recover on its claim through some other means." *Deus v. Allstate Ins. Co.*, *supra*, 15 F.3d at 526.

As discussed above, on the same day that DIBCO filed its motion to intervene, it also instituted an entirely new action in which it raises substantially the same claims it seeks to litigate as intervenors in the Commodities/Lubienski cases. DIBCO asks the Court, both in its Claims and Defenses in Intervention and in its Complaint for Declaratory Judgment and Other Relief, to find that the Government materially breached the MOA and, as a consequence, DIBCO is relieved of its obligations under the MOA to reimburse the Government for payment of the Commodities/Lubienski settlement.

DIBCO, thus, has a ready avenue in the separate action it has already filed in which to dispute its responsibility for payment of the Commodities/Lubienski settlement as well to challenge the reasonableness of the amount it may be required to pay. Having another means to obtain the relief it seeks to obtain by intervention in the Commodities/Lubienski condemnation actions, DIBCO cannot show that absent intervention its ability to protect its interest will be impaired if it is denied leave to intervene.

CONCLUSION

For all of the reasons stated above in this Opinion and Order, the Court finds that DIBCO has failed to establish that it is entitled to intervene as of right in the 1996 and 2001 Commodities/Lubienski condemnation actions. Accordingly,

IT IS HEREBY ORDERED that Detroit International Bridge Company's Motion to Intervene in Civil Nos. 96-CV-75494-DT; 96-CV-75495-DT; and 01-CV-70391-DT is DENIED.

/s/_____
Gerald E. Rosen
United States District Judge